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**Issue Date: 29 September 2004**

**CASE NO.: 2004-LHC-371**

**OWCP NO.: 7-135172**

**IN THE MATTER OF**

**RICKY NACCIO,**
**Claimant**

**v.**

**P.T. CONTRACTORS, INC.**
**Employer**

**APPEARANCES:**

**Lloyd N. Frischhertz, Esq.**
**On Behalf of Claimant**

**Travis LeBleu, Esq.**
**On Behalf of Employer**

**BEFORE: C. RICHARD AVERY**
**Administrative Law Judge**

## DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. 901 et seq., (The Act), brought by Ricky Naccio (Claimant) against P.T. Contractors, Inc (Employer). The formal hearing was conducted in Metairie, Louisiana on June 14, 2004. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments. The following exhibits were

received into evidence: JX 1, CX 1-14 AND EX 1-4. This decision is based on the entire record.

## Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on November 14, 1994;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident;
5. A Notice of Conversion was timely filed;
6. An informal conference was held on September 3, 2003 and October 21, 2003;
7. The average weekly wage at the time of injury was $353.55;
8. Medical benefits have been paid;
9. Permanent disability and impairment rating to the knee is 10%; and
10. The knee injury has attained maximum medical improvement.

## Issues

The unresolved issues in this proceeding are:

1. The relationship of Claimant's back injury to Claimant's initial injury;
2. The nature and extent of disability;
3. Whether permanent and total or whether any disability under §8(c)(21) or whether Claimant is limited to the schedule which has been paid;
4. Whether Claimant's right knee problem is related and/or compensable; and
5. Whether suitable alternative employment exists.

## Statement of the Evidence

Claimant, born August 28, 1967, is 36 years of age and has a seventh grade education which he attained through special education. He is the father of three children who live with him and his fiancée, as does a child from his fiancée's previous marriage. Claimant has performed only heavy manual labor since he left

school in 1984. Since that time, he has worked for several employers in various capacities, including deckhand, roustabout, and commercial fisherman. Claimant worked for Respondent P.T. Construction for approximately five years, most recently as a sandblaster/painter at Bollinger Shipyards; a position he held for three years. While working on November 14, 1994, Claimant attempted to operate a swing rope and fell through a manhole on a ship, catching himself with his arms and shoulders but resulting in a laceration to his left knee.

Following his injury, Claimant was treated by a company physician, Dr. Roy Dugas, who sutured Claimant's knee and took x-rays. Two weeks later at a follow-up appointment, Dr. Dugas referred Claimant to Dr. Dexter Gary at the Houma Orthopedic Clinic, where Claimant complained of pain in his left knee, neck, and lower back. Dr. Gary prescribed physical therapy which Claimant testified "kind of" resolved the pain in his neck and back, but was of no help to his knee which was his primary concern at that time. Thus, Dr. Gary prescribed additional physical therapy for Claimant's knee only, and released him back to work.

Claimant returned to work for two weeks and then chose to see Dr. Gary Guidry, an orthopedist who also worked at Houma Orthopedic Clinic. Claimant testified that he told Dr. Guidry of his knee pain. At that time, Claimant said his neck pain had "completely resolved," and his back pain was "resolving itself." Dr. Guidry sent Claimant for more physical therapy and ordered an MRI of Claimant's knee, which was normal. Dr. Guidry referred Claimant to Dr. Chris Cenac who performed surgery to remove a neuroma in Claimant's left knee, and then cleared Claimant to return to work. This time, Claimant worked for nearly two years, but testified that after returning home from his first day of work, he tried to stand up and his knee gave out, resulting in his falling down. This prompted him to return to Dr. Cenac, who Claimant testified told Claimant there was nothing wrong with his knee and Dr. Cenac could do nothing more.

Claimant then chose to return to Dr. Guidry who ordered a bone scan of the left knee which showed an abnormality of the left patella. Claimant continued to work throughout this period but testified that performing the work was hurting him "a great deal," that it took him longer to do things, and that he fell behind. Upon reporting this to Dr. Guidry, the doctor decided to remove Claimant from work. After taking some time off, Claimant returned to Dr. Guidry who told Claimant that the knee was healed; however, Claimant testified that he did not believe this to be true and thus sought a second opinion from Dr. Pete Rhymes.

Dr. Rhymes determined that a fracture to the patella was present and performed another surgery on Claimant's knee. Claimant stated that this surgery provided some relief from knee pain, but while the knee was resolving, his back "was getting bad." Claimant testified that the insurance company would not authorize treatment for his back pain, so he had to seek treatment for it on his own. To receive treatment for his back, he initially went to Chabert Medical Center in 1997, following his second knee surgery and while still not working. Claimant testified that he would present to clinics or the emergency room at Chabert every three to four months to receive an injection for his back pain. Claimant testified that in 1999 he was referred to the orthopedic clinic where x-rays were taken and it was determined that he needed an MRI on his back, which he was told showed a pinched nerve. For this reason Claimant was referred to neurosurgery at the Medical Center of Louisiana at New Orleans (MCLNO).

Claimant stated that by the time he actually saw the doctor in New Orleans the initial MRI was too old, so another was completed, and Claimant underwent surgery on his back at MCLNO on October 17, 2003. Since that date he has not been released to return to work. Claimant testified that since the surgery, the shooting pain in his legs has improved, but he still has "a great deal of pain" in his back. He is currently taking Vioxx, Lortab, and hydrocortisone for pain. Claimant further testified that he still has pain in his left knee, and that pain in his right knee developed in 1997, but that nothing has ever been done to treat it. Claimant stated that Dr. Rhymes told Claimant that his right knee is bothering him as a result of the injury to the left knee which causes him to use the right knee more.

Claimant testified that he did not have back problems as a child; has never injured his back in any other accident or incident since the 1994 workplace injury; nor has he engaged in any heavy work activity that could have caused such an injury. On cross-examination, Claimant testified that he only made mention of back pain to Dr. Rhymes on one occasion, despite the fact that in a previous deposition Claimant stated that he mentioned the pain to Dr. Rhymes "on several occasions." In addition, when asked whether he recalled a 1999 visit to Chabert Medical Center for treatment of lower back pain wherein the medical record stated that Claimant strained his back "while changing tire yesterday afternoon," Claimant stated he did not recall. Claimant additionally testified that on a similar visit to Chabert in 2000 for back pain, he denied the occurrence of any trauma. When asked how he could link the pain to the work accident since the pain was "off and on" and the accident had occurred six years previously, Claimant explained that certain things he did aggravated his back and that is why he would have to go seek treatment in the form of injections at Chabert. When asked about a

medical record at Chabert that stated Claimant was involved in an altercation with the police the previous night, Claimant stated that the altercation had nothing to do with the pain he sought to treat at that visit. Claimant denied having told his physical therapist in 1994 that his back pain had resolved, despite the fact that the statement was contained in the records; and further stated he had no idea why back pain was not mentioned in the 2001 FCE. Claimant could not explain why Dr. Gary stated in his records in 1994 that Claimant had full range of motion in his back.

Claimant testified that he has sought alternative employment, namely, jobs that were identified by Allen Crane through the worker's compensation program. Claimant testified that he submitted applications for every job that Mr. Crane identified for him, including a maintenance position at the Larose Truck Stop, which Claimant testified he was never contacted about, but regardless he did not think he could have performed the job because it involved constant standing and walking. Claimant testified that he also inquired at Advanced Auto Parts, but when the manager asked Claimant whether he had any work restrictions and Claimant stated he did, the manager said he did not need anyone at the time. Claimant stated that he also applied at Bayou Blue for a position involving the building of lights for oil platforms, but stated that the company never called him. Claimant further testified that he contacted the Louisiana Department of Labor who told Claimant they would put him on a list.

On his own volition, Claimant approached Wal-Mart regarding a greeter position, but testified that he was told that the position was reserved for senior citizens; that he applied with the Department of Solid Waste to drive a garbage truck, but has no commercial driver's license because of his partial blindness. Claimant stated he has not sought employment since having back surgery. He has been awarded Social Security Disability due to his knee, degenerative disc disease of the back, and blindness in his left eye which occurred as the result of a childhood accident. On cross-examination, Claimant testified that he began to keep a log of employment he attempted to obtain, but he lost it. Claimant further stated that he never presented said log to Mr. Crane or to his attorney.

## Medical Evidence

### Deposition of Dr. George Murphy

Dr. George Murphy, a board certified orthopedic surgeon, testified by deposition which comprises Claimant's Exhibit 13. Dr. Murphy performed a

physical examination of Claimant on June 3, 2004 and also reviewed Claimant's medical records at the request of Claimant's attorney. Dr. Murphy testified that during his examination, Claimant stated that he injured his back in the initial accident, that it improved for a while, and began to get progressively worse from 1997 onward (CX 12, p. 9).

Given the records of Claimant's back surgery, Dr. Murphy opined that Claimant's back problems started many years ago; specifically, that the onset could be consistent with eight to ten years ago (CX 12, p.15). Dr. Murphy stated that the L1-2 area of the back is not a common area for degenerative changes to begin, so he suspected that in someone Claimant's age, there may have "been something that precipitated the problem," and stated that a traumatic event was the most likely cause (CX 12, p.16). Dr. Murphy testified that the degeneration at the L4-5 and the L5-S1 level could be strictly from normal aging process as opposed to induced by trauma, or that the trauma could have aggravated the situation as well (CX 12, p.16). When asked whether the description of the accident given to him by Claimant was consistent with sustaining injury at the L1-2 level, Dr. Murphy stated that while the description was "vague," almost anything could be injured by falling into an open manhole (CX 12, p.20).

Dr. Murphy explained the lack of documentation regarding Claimant's back pain by stating that it is not uncommon for a patient to focus on problems that cause more acute symptoms and only turn their attention to another problem after the acute symptoms have resolved. He further stated that if an individual suffers a disc injury, it will then begin to deteriorate and there may be only minimal symptoms to a certain extent until the injury becomes progressively symptomatic. Dr. Murphy opined that if all congenital abnormalities and prior trauma to the back were ruled out, it was more probable than not that the Claimant's accident had some relationship to the problem in his back in the L1-2 area.

On cross-examination, Dr. Murphy testified that it was "impossible to say for sure" how long Claimant had back problems, "it could be almost anything" but the "shorter term you get, the less likely" because of the amount of degenerative problems that were present (CX 12, pp.30-31). Dr. Murphy stated that it was possible that Claimant's back problems could be due to degeneration or normal wear and tear, and opined that an activity such as changing a tire could possibly be a way of injuring the back and "precipitating things." (CX 12, p.31).

**Houma Orthopedic Clinic**

Claimant's Exhibit 1 contains medical records from the Houma Orthopedic Clinic beginning November 29, 1994, the date that Claimant was referred to Dr. Gary by the company physician. The initial visit form, completed by Claimant, states the reason for seeking care was "left knee and neck." (CX 1, p.201). Dr. Gary's notes dated December 12, 1994 state that Claimant complained of neck, lower back, and knee pain, but that Claimant had full range of motion of the neck and back. (CX 1, p.199). The remainder of the notations in Claimant's chart deals with his knee pain for which he was seen periodically by Dr. Guidry from January 4, 1995 until June 11, 1997. Dr. Guidry's last notation stated that the MRI taken of Claimant's knee was normal, and Dr. Guidry informed claimant to direct further concerns about his knee to his surgeon as Dr. Guidry felt he had nothing further in terms of treatment to offer Claimant and could not "explain to him why his knee is still symptomatic." (CX 1, p.192).

Claimant returned to the Houma Clinic and completed a new intake sheet on December 5, 2001 where he listed the reason for the visit as "knee." (CX 1, p.190). On this occasion he was seen by Dr. Larry Haydel who treated his complaints of knee pain with anti-inflammatories. The notes reveal treatment confined to Claimant's knee problems until February 4, 2003 when the record states "Patient has a long history of lower back pain secondary to an injury in 1994," and noted that Claimant exhibited back pain on physical exam. On February 10, 2003, Dr. Haydel's notes indicated that Claimant stated the pain "radiated to his right thigh and left leg down to the calf." (CX 1, p.184).

Dr. Haydel relayed that Claimant stated the 1994 injury started the pain in his back. Dr. Haydel's impression was that Claimant had "a history of lumbar disc with a long history of chronic low back pain by his history," for which Dr. Haydel recommended continued use of anti-inflammatories and muscle relaxers. (CX 1, p.184). On February 25, 2003, Dr. Haydel indicated that Claimant continued to complain of lower back pain and that Claimant stated he was scheduled for surgery the following month at Chabert Medical Center; Dr. Haydel further noted that while the previous MRI showed some small disc protrusions there was no absolute indication for surgery. (CX 1, p.186). Claimant returned on June 2, 2003 wherein the record does not mention back pain, simply a prescription for Vioxx for knee pain. Finally, on September 2, 2003, Dr. Haydel's notes stated that Claimant returned with "the same complaints of knee pain. There is no change." (CX 1, p.179).

**St. Anne General Hospital**

Claimant's Exhibit 2 consists of records from Claimant's emergency room visits to St. Anne General Hospital beginning March 7, 1996; many of these visits appear to be unrelated to the work-related injury (for example, shortness of breath and rash). Claimant presented to the emergency room again on December 21, 1998, his chief complaint being that he was involved in a car accident as a restrained passenger and complained of neck stiffness. Claimant was given Toradol and discharged the same evening. (CX 2, p.17). An x-ray taken of Claimant's left knee as well as a cervical spine film returned normal results. (CX 2, pp. 20, 23). The next visit was July 6, 2002, where Claimant's chief complaint was lower back pain for the past week, and past medical history stated that Claimant had an upcoming MRI scheduled for chronic back pain for three years. (CX 2, p.13). The discharge report for that visit listed Claimant's diagnosis as bilateral L-S disc disease. (CX 2, p.15). On July 9, 2002, Claimant returned to the ER complaining of pain in his lower back. Claimant was given an injection of Toradol and discharged within the hour. (CX 2, p.7). All of Claimant's visits to St. Anne, except one for rash and shortness of breath, involved complaints of back pain.

**Dr. Pete Rhymes**

Claimant's Exhibit 3 contains the medical records of Dr. Pete Rhymes, an orthopedist, who initially saw Claimant for a second opinion on April 12, 1995. Claimant was working at the time but experiencing left knee pain. The MRI was read as normal; however, Dr. Rhymes suggested a patella brace for support.

Dr. Rhymes did not again see the Claimant until May 14, 1997, at which time Claimant complained of unresolved pain in the left knee despite treatment by Drs. Gary, Guidry and Cenac. An MRI determined a small non-healed fracture of the patella which had gone unnoticed in the past. On June 16, 1997, Dr. Rhymes wrote that Claimant was not at MMI, needed removal of the bone fragments at the fracture site and should not participate in activities that required weight bearing or motion of the knee. Thereafter, Claimant underwent the recommended surgery on July 23, 1997, and was taken off work.

Following surgery, Claimant continued complaints of pain, and by notes dated July 9, 1998, he was still under the care of Dr. Rhymes for "removal of fragment" and was to remain off work (CX 3, p.13). Subsequently, on July 15, 1998, Dr. Rhymes confirmed that Claimant suffered a 10% impairment of the left

knee and could not squat, climb or crawl repeatedly, all of which he opined gave Claimant a disability as far as any job requiring such functions.

Claimant continued seeing Dr. Rhymes in the weeks that followed, and by September 16, 1998, Dr. Rhymes suggested the implant of an artificial patella to reduce the "popping" in Claimant's left knee. Claimant's knee continued to bother him; however, following an MRI on November 21, 1998, Dr. Rhymes opined on November 24, 1998, that perhaps there was really nothing more to be done for Claimant's knee and a patellectomy perhaps was not advisable. Following that note, Dr. Rhymes, on January 8, 1999 and September 20, 1999, wrote about Claimant's work abilities, saying that Claimant could not return to manual labor and probably could do no lighter jobs unless he received training. Dr. Rhymes again at that time requested MRI's of both knees, first to determine the condition of the left knee, and secondly, to review the right knee about which Claimant complained and which Dr. Rhymes thought due to over use in compensation for the left knee.

In the notes placed in evidence, Dr. Rhymes never specifically declared an MMI date, never specifically approved any jobs nor never specifically, for that matter, returned Claimant to work status. His notes ended on October 11, 1999. Contained in EX 1 are the vocational records of Allen Crane. Interestingly, the exhibit contains a letter dated September 25, 1998, from Mr. Crane to Dr. Rhymes suggesting the doctor had told the writer, Claimant was at MMI absent additional surgical intervention and capable of light physical work with a 15% impairment rating to the left extremity. A letter from Mr. Crane to Dr. Rhymes dated October 7, 1998, posed the same remarks. Neither letters received a response or at least none that were made available to the evidence. Likewise, a letter dated October 20, 1998, identifying specific jobs went unanswered by Dr. Rhymes.

**Dr. Christopher E. Cenac**

In March 1997, Dr. Guidry had apparently hit an impasse as to what if any treatment remained for Claimant's left knee. His request for an MRI was denied. Employer's Exhibit 2 at pg. 109 is a letter from Dr. Christopher Cenac who in March 1995 had removed a neuroma in Claimant's left knee and cleared Claimant to work at that time. Dr. Cenac, in a one paragraph letter dated March 4, 1997, said he felt Claimant in need of no further treatment and was at MMI. Thereafter on November 2, 1999, Dr. Cenac examined Claimant and said he disagreed with Dr. Rhymes that Claimant was totally disabled from employment, but he did restrict Claimant to no repetitive stooping, squatting, twisting, kneeling or bending

and with lifting restrictions of 50 pounds. He opined that Claimant was at MMI (EX 2, p.123).

**Dr. John Montz**

The medical reports of Dr. John Montz comprise both Claimant's Exhibit 5 and Employer's Exhibit 4. Dr. Montz is an orthopedist at the Ponchartrain Bone and Joint Clinic who performed an IME of Claimant on January 15, 2002. Dr. Montz's report listed Claimant's then-existing complaints as pain, swelling and popping in the left knee, numbness in the knee extending to the ankle; increasing lower back pain since 1997; and discomfort in the right knee which Claimant attributed to favoring the left knee. (CX 4, p.3 & EX 5, p.3). Dr. Montz's physical examination of Claimant revealed full range of motion with discomfort upon flexion during the lumbar exam. Dr. Montz reviewed Claimant's lumbar x-ray dated December 1994 and determined that it showed normal vertebral bodies, normal disc spaces, and normal posterior elements. (CX 4, p.3 & EX 5, p.3). Dr. Montz opined Claimant had "more than adequate time" to recover from his work-related injury and the subsequent knee surgery. (CX 4, p.5 & EX 5, p.4).

**Chabert Medical Center**

Medical records from Chabert Medical Center are found at Claimant's Exhibit 6 and Employer's Exhibit 3. These records span the years from 1998 to 2004, wherein Claimant was treated for a variety of ailments ranging from dysphagia to head congestion.[1] Claimant's first visit related to back pain occurred on March 7, 1998 where the treating emergency room physician made the following notation: "Patient complains of pulling his back while coughing and trying to get up off the sofa at the same time." (CX 6, p.98 & EX 3, p.98). On May 10, 1999, Claimant again presented to the emergency room complaining of lower back pain which started the previous night after changing a tire. Claimant was treated with a shot of Toradol. (CX 6 & EX 3, p.88). Claimant's next visit was October 6, 2000, where he complained of back pain for five days, that he "woke up with pain" and denied any trauma; he was treated with Soma and Motrin and discharged. (CX 6 & EX 3, p. 73).

[1] In addition, Claimant's Exhibit 7 consists of the records of Claimant's 24 hour hospitalization in Chabert's psychiatric service. Claimant was admitted due to suicidal ideation and depression related to relationship issues; there is no mention of his physical ailments with regard to his mental state.

Claimant's complaints of knee pain at Chabert are limited to several instances, the first being on December 7, 2001 where he called the ambulatory clinic and stated his right knee was swollen and there was a "poppy, cracking sensation" upon bending. Claimant was given an appointment one week later which he failed to keep. On March 17, 2002, Claimant went to Chabert complaining of left knee pain and was given Toradol. (p.60). Several x-rays were performed on Claimant's knees; on June 6, 2002 the left knee resulted in a negative study, as did the one performed on the right knee on June 10. The final x-ray performed on the left knee, dated February 10, 2003, failed to show any definite bony or joint abnormalities, and the soft tissues were unremarkable. (p.111). Claimant's complaints related to his knees diminish as the complaints regarding his back increased.

On September 16, 2001, Claimant visited Chabert's emergency room following an "altercation" with the police the night before. Claimant complained of pain to his neck, back, both knees and left wrist, and further stated that he lost consciousness at the scene. The treating physician noted that Claimant was "hit in back of neck and about limbs." (CX 6 & ER 3, p.69). The lumbar spine x-ray performed showed no evidence of fracture or subluxation (p.115), and the cervical spine showed that the vertebral bodies were normal in size, shape and alignment, and the interspaces were well preserved. There was no soft tissue swelling, and no evidence of fracture or sublaxation (p.114).

Claimant visited Chabert's orthopedic clinic on June 6, 2002 after being referred by another Chabert physician with regard to Claimant's knee. The history reported at the orthopedic clinic visit states that Claimant had chronic low back pain for greater than two years and it was getting progressively worse (p.55). The lumbar spine x-ray performed at that visit stated that vertebral bodies were normal in size, shape and alignment in the lumbar spine, pedicles were intact, and there was a compression deformity of the body of T-12 in the lower thoracic spine (p. 113). This result should be compared with a previous lumbar spine film of March 26, 2001, which showed the thecal sac, the epidural fat, and the discs as normal at all levels. (p. 116). At the June 6 visit, Claimant was diagnosed with clonus. The following entries in the chart relate to Claimant leaving phone messages that he was out of pain medication. (p.50) Claimant underwent an MRI on July 24, 2002. There were no previous comparison exams. The impression from the MRI was lower thoracic/upper lumbar degenerative disc disease (p. 48) and impingement on the cauda equina at L1-2 (p. 47). The cervical spine was normal (p. 46).

**Medical Center of Louisiana at New Orleans (MCLNO)**

On February 17, 2003 Claimant went to Chabert's orthopedic clinic for chronic lower back pain. A referral to orthopedics was apparently necessary because conservative management had failed. The orthopedic clinic subsequently referred Claimant to neurosurgery at MCLNO in order to have back surgery. Claimant's Exhibit 9 is Claimant's chart relating to this procedure. On October 17, 2003, Claimant underwent a L1-L5 decompressive laminectomy (p.45). Post-surgery, Claimant was still complaining of lower back pain which was treated with Lortab, but the subsequent MRI was without any significant findings (p.101).

## Other Evidence

Allen Crane, a rehabilitation counselor, testified through a post-hearing deposition. His deposition is found at Employer's Exhibit 5. Mr. Crane testified that he conducted a vocational assessment of Claimant on September 3, 1998, which may be found at Employer's Exhibit 1. Mr. Crane stated that he administered tests to Claimant in order to assess Claimant's academic abilities. Claimant tested at an 8th grade reading level and a 4th grade passage comprehension level. Based on these results, Mr. Crane opined that Claimant was of limited literacy, but was not functionally illiterate.

After reviewing Claimant's medical records from Houma Orthopedic Clinic, Terrebone General Medical Center, Drs. Rhymes and Cenac, and Our Lady of the Sea, Mr. Crane completed a labor market survey and concluded that there were available jobs which Claimant could realistically perform. These jobs were located in October of 1998 and ranged in pay from $5.50 to $10.00 per hour. They included telephone repair technician, field service technician, auto service technical helper, garbage truck driver, courier driver, and janitor. Mr. Crane stated that all of these positions were at the time approved by Dr. Rhymes, who stated that Claimant was capable of work at the light level.[2]

On March 30, 2000, Mr. Crane identified additional jobs for Claimant which was approved by Dr. Cenac. These jobs included machine operator, food service worker, electronic assemblage trainee, and police radio dispatcher. As indicated

[2] On cross-examination, Mr. Crane testified that he could not explain the omission of the letter signed by Dr. Rhymes approving the jobs, since Dr. Cenac's letter was present; but he stated that based on standard procedure, Dr. Rhymes would have had to approve the positions before the list was sent to Claimant.

above, Claimant testified that he applied for some of these jobs as well as others and was unsuccessful in securing employment. Mr. Crane testified that Drs. Rhymes and Cenac indicated that Claimant could perform work at the medium physical demand level, but the functional capacity evaluation conducted in 2001 placed Claimant at light to medium level. According to Mr. Crane, it was possible that there may have been some jobs he identified that were consistent with Dr. Cenac's opinion but in excess of the FCE.

Mr. Crane stated that Claimant never mentioned any problems related to his back during the interview, and further testified that if Claimant had mentioned such problems, Mr. Crane would have included it in his report. However, on cross-examination Mr. Crane testified that he was no longer employed by the company he was with when he interviewed Claimant and thus did not have access to the notes he used to complete his report. Mr. Crane testified that the fact that Claimant lacked vision in his left eye would not preclude him from obtaining a Class D driver's license (a chauffeur's license), so jobs such as driving a shuttle bus, crew van or taxi would have been appropriate for Claimant. On cross-examination, Mr. Crane stated that a Class D license differs from a commercial license, for which an applicant would have to pass a physical exam.

Richard W. Bunch, Ph.D., PT, conducted an FCE on December 14, 2001 at the request of Dr. Guidry. The functional capacity evaluation (FCE) is found at Claimant's Exhibit 4. The FCE listed Claimant's physical demand level capacity as light-medium with restrictions, specifically related to squatting and kneeling. (CX 4, p.2).

Nancy Favaloro, a rehabilitation counselor, was both deposed and completed a report on June 7, 2004; both of which may be found at Claimants Exhibits 12 & 13, respectively. After reviewing Claimant's medical records, including the operative report from MCLNO, she conducted a labor market survey. Taking into account Claimant's restrictions, education, and skills attained from prior work history, she concluded that there were not many jobs available for which Claimant could realistically compete. Because Claimant had performed almost all unskilled labor in the past, she opined that his skills do not easily transfer into other settings; but she noted that Claimant does possess basic work skills that he could use in entry-level settings.

Ms. Favaloro concluded that Claimant is not employable on a full-time basis given his unskilled work history, inability to perform meaningful reading, and his anticipated work restrictions. In arriving at her opinion, Ms. Favaloro relied on the

medical documentation, as well as the deposition of Dr. Murphy, wherein the doctor surmised that given Claimant's knee surgery and attendant recuperation, he would be limited in the amount of standing, walking and sitting. Additionally, because of the seriousness of Claimant's back surgery, she stated that Dr. Murphy opined that Claimant would have a hard time sitting all day unless he could change positions, which may include Claimant having to lie down during the day.

Given these sedentary restrictions, Ms. Favaloro opined that most of the jobs she found in Claimant's locale would be inappropriate for a variety of reasons: they required a commercial driver's license; a high school diploma was needed; or they were part-time, but the majority would require Claimant to engage in activities he was restricted from performing. These jobs included security guard, a greeter position at Wal-Mart, and sewing machine operator (CX 12, p. 21-23).

Claimant's Exhibit 12 consists of Claimant's award of Social Security Disability. Claimant was initially denied disability benefits on March 7, 2001, but the award was subsequently granted on January 22, 2004 due in part to Claimant's degenerative disc disease which was considered severe under Social Security regulations.

## Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc.*, 114 S.Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of t6he Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

This is not a simple case, both because of time that has elapsed since the accident and because of the various medical providers involved whose records do not always appear to be complete. Based on the evidence before me, however, it is

my finding that as a result of Claimant's industrial accident of November 14, 1994, 1) Claimant suffered injuries to his left knee, his right knee and his low back; 2) that Claimant is not at MMI; and 3) that since June16, 1997, when Dr. Rhymes restricted Claimant's activities and recommended surgery to remove the bone fragment in Claimant's left knee, that Claimant has been and remains temporary totally disabled.

## Causation

Section 20(a) of the Act provides the claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered harm and that employment conditions existed which could have caused, aggravated, or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co.*, 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.*, 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir. 2003), *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20(a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on November 14, 1994, during the course and scope of Claimant's employment. I find that harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties' stipulation. Claimant clearly injured himself when he fell through a manhole at work. The extent, duration, and disabling effects of that injury, however, are in issue.

There has never been any question concerning the causation of Claimant's left knee problems, the issue for my determination involves Claimant's right knee and back pain. As to both, I find that in addition to his left knee Claimant has invoked the presumption that some harm has come to his back and right knee as a result of his 1994 job injury.

**Right Knee**

While Claimant's right knee has appeared normal in radiological studies, he has complained of discomfort in that knee for some time. The complaints have caused his treating physician, Dr. Rhymes, to opine that while the right knee may not have received a direct injury in 1994, that it could have received harm by over use while compensating for the left knee. Dr. Rhymes also opined that the discomfort in that knee was sufficient to investigate, and he ordered an MRI which has not been approved. Consequently, in the absence of any other medical evidence on the issue, I find Claimant has invoked the Section 20(a) presumption with a regard to his right knee and that there has been no rebuttal of the presumption.

**Back**

Turning to Claimant's back, I find that through his testimony and that of Dr. Murphy, as well as complaints to other medical providers throughout the years, Claimant has shown some harm to his back occurred immediately after the injury, as well as later on, and that it is arguably related to his original on the job injury in 1994. Specifically, one of the earliest medical reports following Claimant's injury listed one of his complaints as back pain. (CX 1, p. 199). At the time Dr. Gary provided Claimant with physical therapy for the back, and Claimant testified that his back resolved with treatment but then reappeared. In explaining this scenario, Dr. Murphy opined that the on the job injury could have caused the initial damage to Claimant's back, the pain then resolved, only to reappear later on. Dr. Haydel also related Claimant's back pain to his 1994 accident.

Having found that Claimant has met the presumption, I nonetheless conclude that Employer has rebutted the presumption through the presentation of substantial evidence. Dr. Montz concluded that Claimant had adequate time to recover from his knee injury and the attendant surgery. He also interpreted the 1994 MRI of Claimant's back as normal. This evidence is sufficient to rebut the Section 20(a) presumption. Because Employer has rebutted the presumption, I must weigh all of the evidence and my decision must be supported by substantial evidence; and in this instance, I find that Claimant has established causation with regard to his back injury.

Claimant complained of back pain beginning with the first medical examination following his work-related injury. Despite the fact that the back pain resolved with treatment, it was noted both initially and again when it returned. Dr.

Murphy testified that it is common for a patient to focus his complaints on those symptoms which are most acute, only honing in on residual symptoms once the most troubling ones subside. Though Claimant did not complain of back pain at every medical visit over the years since his accident, the fact remains that the record contains evidence from various health care providers, including treating physicians at Houma Orthopedic Clinic, Chabert Medical Center, St. Anne's Hospital, and MCLNO, which supports his claims of back pain since the original injury, culminating in the need for back surgery on October 17, 2003.

In sum, I find the testimony of Dr. Murphy more persuasive than the report of Dr. Montz, primarily because Dr. Murphy conducted a physical examination of Claimant on June 3, 2004, which was after Claimant's back surgery. Dr. Montz saw Claimant only once, in 2002, and based his opinion of Claimant's back on an MRI taken in 1994. Accordingly, I find Claimant's back pain to have been a result, at least in part, of Claimant's 1994 accident. The extent, duration and disabling effects of the injury remain an issue.

## Nature and Extent

Having established that Claimant was injured, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.*, 17 BRBS 56, 59 (1975). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Id*. at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.*, 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.*, 20 BRBS 184, 186 (1998); *Williams v. Gen'l Dynamics Corp.*, 10 BRBS 915 (1979).

While the parties stipulated in Joint Exhibit 1 that Claimant reached maximum medical improvement with regard to his left knee, no date was provided (JX 1); and based on a review of the record, I find no reliable evidence to support a

date. Dr. Rhymes never specifically provided a date, and his last notes in 1999 were still urging the need for additional MRI's of both knees. While Mr. Crane wrote of an MMI date to the left knee, Dr. Rhymes did not respond to his letter. The only mention of MMI to the left knee came from Dr. Cenac who previously missed Claimant's fractured patella and returned Claimant to work in 1995, and Dr. Montz who never saw Claimant. Therefore, I am unwilling to accept these opinions.

Consequently, inasmuch as the record contains no evidence of MMI to the right knee for which Dr. Rhymes seeks an MRI nor no evidence of MMI to Claimant's back from which he is recovering surgery nor any reliable evidence of MMI to Claimant's left knee, I find Claimant has not arrived at maximum medical improvement.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes*, 930 F.2d 424, 430 (5th Cir. 1991); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir. 1981).

To establish suitable alternative employment, the employer does not have to find the claimant a specific job, but must show that there are jobs available within the claimant's physical and educational abilities, age, experience and geographic area which he could secure and perform if he diligently tried. *Id*. at 1041-42. Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. Gen'l Dynamics Corp.*, 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co.*, 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

Claimant has established a prima facie case for total disability based on the restrictions imposed on him by Dr. Rhymes, the opinion and assessment of Dr. Murphy, the FCE assessment and the vocational rehabilitation expert.

Furthermore, the parties do not dispute that Claimant cannot return to his previous employment, nor is there any current opinion, medical or otherwise, which suggests that Claimant is physically capable of returning to his former position as a sandblaster or painter. The burden thus shifts to Employer to show the existence of suitable alternative employment.

In order to establish suitable alternative employment, an employer must show that the claimant is capable of working, even if it is within certain medical restrictions, and there is work within those restrictions available to him. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981).

Dr. Rhymes placed several restrictions on Claimant's ability to work, namely climbing, stooping, kneeling and crawling. In August 1998, Allen Crane met with Claimant in order to conduct a vocational assessment. In October 1998, Mr. Crane conducted the first of three labor market surveys and identified jobs which he found to meet Claimant's ability and the restrictions imposed upon him by Dr. Rhymes, and Dr. Rhymes subsequently approved the jobs.

Mr. Crane completed another labor market survey in March 2000. The jobs identified for Claimant by this survey were within Claimant's restrictions and were approved by Dr. Cenac who by then had too placed restrictions on Claimant. Finally, Mr. Crane identified additional jobs in May, 2002. The jobs identified by Mr. Crane included garbage truck driver, courier, auto service technician helper, janitor, electronic assembler trainee, maintenance person, cashier, and security guard.

Based on the above, arguably Employer has met its burden that as of reaching maximum medical improvement on July 15, 1998, there existed suitable alternative employment for which Claimant could have competed, qualified and performed. Claimant has a limited education which was obtained through special education programs, he has only performed heavy unskilled labor, and cannot possess a commercial driver's license. All of these elements, combined with the medical restrictions imposed on him, do not make him an easy candidate for employment, yet Mr. Crane identified several positions which Claimant could possibly have performed and qualified for under the restrictions then in place, namely kneeling, crawling and climbing.

If the employer has established suitable alternative employment, however, the claimant can nevertheless prevail in his quest to establish total disability if he

demonstrates that he diligently tried and was unable to secure employment. *Hairston v. Todd Pacific Shipyards Corp.*, 849 F.2d 1194, 1196 (9th Cir. 1988); *Fox v. West State, Inc.*, 31 BRBS 118 (1997). The claimant must establish reasonable diligence in attempting to secure some type of suitable alternative employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043, 14 BRBS 156, 165 (5th Cir. 1981).

Claimant testified that he unsuccessfully applied for all of the jobs identified by Mr. Crane. Claimant stated that he was told there was no need for an additional employee, or that the potential employer said they would contact Claimant but never did. Claimant testified that he called Mr. Crane and told him that he applied for the positions but had received no follow-up calls, and stated that Mr. Crane told him to "keep calling." Claimant stated that he followed up with all of the places he applied, calling them three or four times per week. In addition, he contacted several potential employers in his community on his own, called the Louisiana Department of Labor Job Service in Houma, and his brother helped him use the computer to look for jobs. While, Claimant has no record of where he applied or when he did so; he stated that he made a log but it got lost. Claimant also stated that once he is released to work following his back surgery, he is willing to look for jobs again.

Nancy Favaloro testified that Claimant is not employable based on his functional illiteracy, sedentary restrictions, and the area in which he resides. She stated that she did not think that there was work available for Claimant in his area of residence. She opined that Claimant needs entry-level type work, and the positions she found in his area of residence were inappropriate given Claimant's restrictions. Ms. Favaloro reviewed Dr. Murphy's deposition and determined that sedentary restrictions were in place for Claimant's knee, she further opined that given the extensive area that was treated in his back surgery, Claimant would likely face additional restrictions upon reaching MMI. Ms. Favaloro stated that in conducting her labor market survey, she considered both restrictions pertaining to Claimant's knee and back, but that the two were not terribly different in that they both restricted Claimant to sedentary jobs. Mr. Crane, on the other hand, interviewed Claimant only once, and then in 1998, and has not reviewed Dr. Murphy's testimony or Claimant's medical records pertaining to his back.

Additionally, Ms. Favaloro found several of the jobs identified by Mr. Crane to be inappropriate given the restrictions imposed upon Claimant. Specifically, she

opined that Claimant cannot obtain a commercial driver's license, so the garbage truck and driver positions were not realistic. Further, the security guard position was outside of Claimant's restrictions because it required lifting up to 50 pounds. Of the jobs that Ms. Favaloro found in Claimant's area of residence, she stated that most of them were not appropriate for Claimant's restrictions. For example, a greeter position at Wal-Mart, while within Claimant's literacy range, would require him to stand for four-hour shifts, which falls outside the restrictions. In addition, the security guard position identified by Mr. Crane would require 50 pound lifting on some occasions, which Ms. Favaloro found to be well outside of Claimant's sedentary and light restrictions.

Consequently, because Claimant established that he diligently tried and was unable to secure suitable alternative employment identified by Employer and his testimony is supported by the opinion of Ms. Favaloro, I find that Claimant has established total disability.

## Section 14(e) penalties

Under Section 14(e) an employer is liable for an additional 10 % of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. § 914. In this instance, the parties agreed Employer either timely paid compensation or controverted this claim and no § 14(e) penalties are owed. (JX 1, p. 1).

## ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from June 16, 1997 and continuing, based on the average weekly wage of $353.55;

(2) Employer shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's injuries of November 14, 1994;

(3) Employer shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961;

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response; and

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 29th day of September, 2004, at Metairie, Louisiana.

A

**C. RICHARD AVERY**
**Administrative Law Judge**

**CRA:bbd**